**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C.**

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| In the Matter of | ) | |
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| Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996 | ) | CC Docket No. 96-146 |
| | ) | |
| Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services, and Toll-free Number Usage | ) | CG Docket No. 04-244 |
| | ) | |
| Truth-in-Billing and Billing Format | ) | CC Docket No. 98-170 |
| | ) | |
| Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, Florida Public Service Commission Petition to Initiate Rulemaking to Adopt Additional Safeguards | ) | RM-8783 |
| | ) | |
| Application for Review of Advisory Ruling Regarding Directly Dialed Calls to International Information Services | ) | ENF-95-20 |

# Reply Comments of Pilgrim Telephone, Inc.

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## SUMMARY

Many of the commenting parties responding to the Commission's Notice of Proposed Rule Making (2004 NPRM) in this proceeding to develop policies and rules governing interstate pay-per-call and other information services agree with Pilgrim Telephone, Inc. (Pilgrim), that the 900 number-based information services industry is in a state of collapse and that many of the Commission's proposals in the 2004 NPRM fall short of proposing steps necessary to rejuvenate the industry. Many of the Commission's proposals, in fact, would be likely to accelerate the industry's decline by imposing additional and unwarranted burdens and restrictions on the way that pay-per-call service providers are permitted to deliver their services to consumers.

Several commenting parties have echoed the concerns expressed by Pilgrim that few carriers are still providing 900 number service; that many local exchange carriers (LECs) refuse to provide billing and collection for 900 services, and those that do so generally follow policies that hamper the ability of pay-per-call providers to collect for services provided to consumers; that the lack of 900 number portability has further hamstrung pay-per-call providers in operating their businesses; that pay-per-call providers face excessive transport costs that are out-of-line when compared to transport costs for other services; and that the Commission's failure to impose requirements on wireless carriers, Voice over Internet Protocol (VoIP) providers, and competitive local exchange carriers (CLECs) is depriving consumers of access to 900 services.

Each of these problems poses serious difficulties for pay-per-call providers, and the accumulation of these structural ills plaguing the 900 service industry makes it imperative for the Commission to seek solutions that will secure the viability of the industry while also ensuring that consumers are protected from the unscrupulous practices of some service providers.

Pilgrim believes, however, that, even in the face of the dire situation currently faced by the pay-per-call industry, if the Commission accepts the suggestions and arguments made by many of the commenting parties on several specific issues raised in this proceeding, then the decisions made by the Commission will go a long way toward enabling pay-per-call providers to compete in the information services marketplace and continue to meet consumer demand for their services.

Specifically, Pilgrim urges the Commission to:

- Refrain from imposing any further limitations on the statutory definition of pay-per-call services.
- Permit the directory assistance services exemption established in Section 228 of the Communications Act of 1934 (Act) to continue to apply to enhanced directory assistance services, and to refrain from restricting the scope of the exemption.
- Reject any *per se* rules that would prohibit commission arrangements between carriers and information service providers, and instead explore the establishment of benchmarks for charges as a means of protecting consumers.
- Conclude that the Commission's current rules are sufficient to address any consumer concerns regarding billing for pay-per-call services, and that there is no need, for example, to seek to protect "subscribers" as well as "calling parties" under the rules governing toll-free calls.
- Reject a suggestion that the Commission should flatly prohibit the use of 800 numbers for pay-per-call services.

- Reject any across-the-board ban on the disconnection of local services in cases in which customers fail to pay charges for pay-per-call services or related long distance services.
- Refrain from taking any steps to apply Section 228 of the Act, as enacted by the Telephone Disclosure and Dispute Resolution Act of 1992 (TDDRA), to data services.
- Permit the full range of electronic transaction confirmation practices recognized under the Electronic Signatures in Global and National Commerce Act to be used as evidence of written agreements for purposes of TDDRA, and adopt regulations extending the Commission's third party verification rules to telephone pre-subscription agreements.
- Refrain from adopting any rules purporting to deal with "modem hijacking" that would impose unwarranted requirements or burdens on legitimate information service providers, but undertake reasonable provisions where it has jurisdiction to put an end to this practice.

Pilgrim and other commenting parties have attempted to provide a roadmap that will continue to protect consumers from scam operators and other unscrupulous service providers, but that will spare information service providers from burdensome requirements and will also correct structural failures that have brought the 900 service industry to the brink of ruin. Pilgrim encourages the Commission to take the actions necessary to revitalize an industry that provides a wide range of services to consumers.

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# Reply Comments of Pilgrim Telephone, Inc.

Pilgrim Telephone, Inc. (Pilgrim), by counsel, hereby submits its Reply Comments in the above-captioned proceeding in response to the Commission's 2004 NPRM.[1]

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[1] *Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996; Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services, and Toll-Free Number Usage; Truth-in-Billing and Billing Format; Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act, Florida Public Service Commission Petition to Initiate Rule Making to Adopt Additional Safeguards; Application for Review of Advisory Ruling Regarding Directly Dialed Calls to International Information Services*, CC Docket No. 96-146, CG Docket No. 04-244, CC Docket No. 98-170, RM-8783, ENF-95-20, Notice of Proposed Rule Making and Memorandum Opinion and Order, FCC 04-162, released July 16, 2004, 69 F.R. 61,152 (2004 NPRM).

## I. INTRODUCTION

It is clear from many of the commenting parties that the 900 number-based information services industry is nearly defunct.[2] This was also recognized by the Commission in the 2004 NPRM,[3] and is evident from the limited number of commenting parties in both the Notice of Proposed Rule Making issued by the Commission in July of 1996[4] and this 2004 NPRM.

The reasons for this are equally clear, and are reflected in the comments. The Commission has failed to take any reasonable steps to address structural problems that have led to the migration of information services to other platforms and to the practical demise of the industry.[5] The Commission's proposals largely do not address any of these industry problems. While the Commission's recognition in the 2004 NPRM[6] that the *Marlowe* staff opinion letter[7]

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[2] *See, e.g.*, Marilyn Fox Comments (electronic comments submitted by Internet e-mail) (current costs for 900 transport are high and access to 900 numbers in the United States is limited; 900 calling service is on its last breath and needs to be revived); HFT Comments at 8-10 (inappropriate and unwarranted restrictions and limitations prohibit widespread 900 usage; the lack of 900 viability has led to the emaciation of 900 call volume); John Lawless Comments (electronic comments submitted by Internet e-mail) (carriers are withdrawing from the 900 market and information providers are being put out of business; information providers are forced to seek alternative calling patterns because of the high cost of 900 transport and the high level of consumer fraud associated with 900 service); Adelle Simpson Comments (electronic comments submitted by Internet e-mail) (listing a number of reasons for the demise of 900 service, including a "total focus on consumer protection and no focus on protection of the businesses that [offer] information via 900 service"). *Cf.* Blue Audio Inc. Comments at 3 n.1 (only one long distance carrier currently offers 900 transport service).

[3] *See* 2004 NPRM at para. 20.

[4] *Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996*, CC Docket No. 96-146, Order and Notice of Proposed Rule Making, 11 FCC Rcd 14738 (1996) (1996 NPRM).

[5] *See, e.g.*, Marilyn Fox Comments; HFT Comments at 8-10; John Lawless Comments; Adelle Simpson Comments.

[6] 2004 NPRM at para. 31.

[7] *Ronald J. Marlowe, Esq.*, DA 95-1905, 10 FCC Rcd 10,945 (Com. Car. Bur. 1995).

was ill-founded and ill-informed, and overruled by *Jefferson,*[8] is well reasoned, the majority of the remainder of the policies set forth by the Commission in the 2004 NPRM should not be adopted. Instead, the Commission should look to fix the problems that the majority of the commenting parties has identified.

## II. DEFECTS IN AND CORRECTION OF THE CURRENT SYSTEM

### A. Defects in the Current System

The commenting parties that address the problems with the viability of the 900 number industry are fairly unanimous as to the reasons behind its demise. Very few carriers still provide 900 number service.[9] As Pilgrim noted in its Comments, many of the local exchange carriers (LECs) will not provide 900 number billing.[10] When billing is provided, the LECs invoke very liberal forgiveness policies that encourage consumers to use 900 number service, and then refuse to pay for it with no recourse.[11]

There is no portability of 900 numbers. Several commenting parties point to the problems caused by the Commission's failure to require portability for 900 numbers.[12] The

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[8] *AT&T v. Jefferson Tel. Co.*, 16 FCC Rcd 16130 (2001).

[9] *See, e.g.*, Blue Audio Comments at 3 n.1.

[10] Pilgrim Comments at 5.

[11] *See, e.g.*, John Lawless Comments (the "first time forgiveness" policy has been abused both by consumers and LECs; moreover, LECs "don't even pretend to limit the credits to a 'one-time forgiveness', and since the chargebacks are not reported [by the LECs] promptly, sometimes consumers receive three to six months of 'free' service before the information provider has an opportunity to block the caller").

[12] *See, e.g.*, Marilyn Fox Comments (900 transport costs are high and access to 900 numbers is limited; "[i]f 900 numbers were transportable, then access could be sold to interested parties, without the substantial start up burdens associated with . . . access" in the United States); HFT Comments at 9; John Lawless Comments (because of a lack of any portability requirement, transport rates for 900 services are disproportionately inflated); Adelle Simpson Comments (the Commission's failure to require portability for 900 numbers, even though there is no technical limitation on portability, has enabled carriers who control 900 numbers "to determine if the

Commission has mandated the portability of almost every type of number and exchange except 900 numbers,[13] and there is no excuse for not mandating it here. Portability would at least permit companies with 900 numbers parked at carriers not willing to provide service to move these numbers to the only carriers still providing service.

The cost of transport, and billing and collection in the few instances where it is provided, is excessive.[14] The carriers that have provided infrastructure for 900 number service in the past appear to have taken the approach that so long as information service providers are making large profits, then they should share in them. This conduct is not appropriate and should not be tolerated by the Commission. Carriers should be required to provide transport at the same prices as 800 number transport, and provide billing and collection at prices equivalent to what each of the carriers charges its own subsidiaries. The provision of reasonably priced non-discriminatory service is necessary for the industry to survive.

Increasing numbers of consumers have no access to 900 number services and other information services. Consumers serviced by wireless carriers, Voice over Internet Protocol (VoIP) carriers and competitive local exchange carriers (CLECs) cannot obtain access.[15] Even

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numbers can offer service" and has deprived information service providers of any "opportunity to find another carrier to take over a 900 number and continue service").

[13] The Commission, for example, required that wireless numbers must be portable in the Nation's 100 largest markets, in a rule that took effect on November 24, 2003. Since then, nearly 8 million wireless phone users have switched their carriers and retained their cell phone numbers. The requirement also has been extended to cover smaller and rural markets. Bruce Meyerson, *FCC: 8M Wireless Users Keep Cell Numbers*, Associated Press, Nov. 23, 2004.

[14] *See, e.g.*, Marilyn Fox Comments ("current costs for 900 transport are high . . . [c]ontrary to the cost reductions seen across the board in US telecommunications in the past several years, 900 transport costs have increased, adding to the cost and expense burden for both businesses and consumers"); John Lawless Comments (900 transport rates range from 25 cents per minute to as high as 42 cents per minute; this compares to 3 cents to 8 cents per minute for 800 services).

[15] *See, e.g.*, HFT Comments at 9; Adelle Simpson Comments (the absence of any requirement that wireless carriers, broadband access carriers, or CLECs must provide connections for 900

when an information service provider attempts to provide information services under one of the other methods expressly permitted by Congress, these alternate providers often do not provide the underlying information necessary to verify identity and billing and collection, making the provision of service very difficult. Access to information services, and billing and collection, should be mandated for all alternate providers of carrier and carrier-like services.

### B. Liability for Termination of Service

The fact that many carriers have withdrawn the offering of 900 number service, and billing for such services where still provided, could provide immense liability for the major interexchange carriers (IXCs), LECs and other carriers not providing service. Section 228(e)(2) of the Act[16] provides that carriers will not be subject to liability for the cessation of provision of pay-per-call service, "unless the complainant demonstrates that the carrier . . . did not act in good faith."[17]

Pilgrim submits that carriers who have withdrawn their offerings of pay-per-call and 900 number service, those who do not permit interconnection and those refusing to provide billing and collection have done so on a basis that does not qualify as good faith. Although Pilgrim is aware of no information service provider who has availed itself of this statutory complaint provision, Pilgrim invites the Commission to opine on whether information service providers should attempt to use this section to remedy the fact that carriers have withdrawn the basic infrastructure necessary to provide 900 number service. Pilgrim is confident that complainants bringing civil actions pursuant to the terms of Section 228(e)(2) of the Act would be able to

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services has limited the available market for 900 services; moreover, "[a]s broadband access becomes available in more markets and more consumers drop land line service in favor of wireless service, information providers have fewer consumers reachable via 900 service").

[16] 47 U.S.C. § 228(e)(2).

[17] *Id.*

show that carriers have acted in bad faith by pursuing anti-competitive motives in seeking to impede the ability of information service providers to offer pay-per-call services.

### C. Sustaining Charges

Commenting parties agree with Pilgrim that there is ample reason to require carriers to sustain and bill for charges incurred by consumers using pay-per-call services, rather than providing credits to these consumers.[18] Commenting parties also agree that consumers have an obligation to control use of and access to their telephones.[19] If a consumer does not want to pay for 900 number charges, blocking is available. It is extremely easy for a carrier to verify that a 900 number call was made from a particular phone number. Once such a call is made, if the consumer has not blocked 900 number access, the consumer should be liable for the cost of the call so long as the service is provided in accordance with Commission regulations. There are very few other industries in which the government provides a mechanism for consumers to obtain free goods and services, and the Commission should put an end to the practice in this industry.

## III. INDIVIDUAL RECOMMENDATIONS

The Commission has made a number of recommendations that are commented upon by the parties, and Pilgrim will address some of these briefly.

### A. Limitation of Definition of 900 Number Service

As noted by several of the commenting parties, further limitation of the definition of pay-per-call service, or prohibition of the use of 800 numbers, is simply not permitted under the

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[18] *See* John Lawless Comments (the lack of carrier collection requirements has resulted in widespread consumer fraud; "[c]onsumers have been trained to think that they do not have to pay for their 900 calls" and "[t]his is reinforced by the [LEC] billing inquiry centers . . . where the first thing that is usually asked is whether the caller[s] would like a credit for their 900 charges").

[19] *See* HFT Comments at 12 (the "vast majority of [pay-per-call] complaints are from people who are simply unwilling to take responsibility for supervising the use of their telephones").

statute.[20] Unlike the Federal Trade Commission's (FTC's) statute, which permits the extension of certain advertising and billing regulations to services beyond the original definition, Congress set forth a clear definition of pay-per-call service for the FCC to follow. Congress did not provide either agency with the authority to prohibit additional services, only to provide for the extension of regulations to them.

### B. Directory Assistance

Metro One Telecommunications, Inc. (Metro One), raises valid issues related to the definition of directory services. Currently, many carriers provide enhanced directory information services. These provide call completion to specified services, and enhanced information about directory listings, for a fee in addition to the cost of transport.[21] It will be impossible for the Commission to define "in" or define "out" certain kinds of directory services from the definition of pay-per-call or information services without venturing into impermissible content regulation. Congress saw fit to exempt directory services, without providing further limitations or granulation.[22]

Pilgrim agrees with Metro One that the Commission should avoid the temptation to restrict the definition of directory services, and permit the definition to continue to apply to enhanced directory services that provide information in addition to simple listings.[23] The directory services provision is already limited only to common carriers, local exchange carriers and their affiliates, and this limitation and the concomitant regulations applied to such carriers should be sufficient to prevent abuse. The Commission should focus on ensuring that the 800

[20] *See* Blue Audio Comments at 1, 4-6; HFT Comments at 5-8.

[21] Metro One Comments at 3.

[22] *Id.* at 4-5.

[23] *See id.* at 4.

number use policies continue to apply to these services, but not attempt to impose further restrictions.

### C. Commissions to Carriers

Pilgrim believes that AT&T's comments related to the *Marlowe* and *Jefferson* cases to be both misguided and curious. Not only has the payment of commissions for the stimulation of call traffic been a standard industry practice for decades, AT&T has long been one of the leading carriers paying commissions for the stimulation of call traffic. These commissions are paid for captive traffic from hotels and motels, collect traffic from various sources and other sources[24] – without regard to the origin or content of the traffic.

There is no justification for discrimination in the payment of commissions due solely to the content of the calls, and Pilgrim submits that such discrimination is not only bad public policy, it may well constitute an impermissible content based regulation. AT&T's concerns appear to arise from situations where it is having to pay larger than usual termination and other fees to third parties that it believes, rightly or wrongly, are driven by commissions to information service providers. The solution to the problem alleged by AT&T is not the prohibition of commissions except when AT&T wants to pay them to stimulate traffic on its network, but to provide for reasonable limits on the charges for services commonly linked with commissions for information services traffic.[25]

As Pilgrim noted in its Comments, this objective could easily be accomplished by adopting a market based maximum rate system such as that successfully implemented in the

[24] *See* John Lawless Comments ("[t]here is a long history in the telecommunications industry for providing commissions for calls generated from pay phones, hotels and motels, shared residence, etc.").

[25] *See* HFT Comments at 10-11.

Telephone Operator Services Consumer Information Act of 1991 (TOCSIA).[26] Under TOSCIA the Commission successfully combated the problem of unreasonable charges being levied by certain public telephone providers by establishing a reasonable, although informal, "safe harbor" cap on charges based on the prevailing dominant carrier's charges for a casual operator assisted call.

Under this system, so long as the charges for the underlying call, or access charges, or other similar charges, did not exceed the highest cost charged by other major carriers, then the cost of the call would be deemed not to be an information service charge, but only a transport charge. As the charge for the call would not exceed the cost that a consumer would pay for any other type of call, there is no harm to the consumer,[27] and the Commission can avoid having to regulate based on content or purpose of the call. Pilgrim believes that its recommendation is consistent with the findings of *Jefferson* and the other cases it discussed in its Comments.

Pilgrim also notes that under such situations, as when the charge for the call would be considered to be only a transport charge, it would also be billed as a long distance call. The call would otherwise be exempt from the Telephone Disclosure and Dispute Resolution Act of 1992 (TDDRA)[28] and neither a billing disclaimer nor separation from other charges would be required.

**D. Line Subscriber versus Calling Party**

Considering the Commission's suggestion that the term "calling party" be extended to the "subscriber" under the 800 number restrictions:[29] such a change would make the Commission's regulations inconsistent with the clear language enacted by Congress. Pilgrim agrees with

[26] Pilgrim Comments at 17-18.

[27] *See* Blue Audio Comments at 6.

[28] 106 Stat. 4181 (1992) (codified at 47 U.S.C. § 228).

[29] 2004 NPRM at para. 12.

commenting parties who argue that the current rules are sufficient to address any billing concerns.[30] The Commission simply does not have the authority to make this change.

In any event, the Commission's proposed change is naive and impractical. The LECs, CLECs and other first line providers of local exchange and local exchange like services have a monopoly on the consumer proprietary network information and other subscriber information related to calling lines. Real time access to this information is required in order for information providers to confirm the identity of a calling party or a subscriber to a line. Unless the Commission undertakes to require that LECs, CLECs and others make this information available on a real time basis, any imposition of additional requirements to verify a subscriber's identity would be meaningless. The Commission simply has taken no steps to ensure the validity of any type of verification system, and therefore cannot mandate requirements based on information that is not available.

**E. Issues Raised by NASUCA**

Commenting parties appear to be interested in finding ways to fix a system that has become dysfunctional.[31] The only exception to this are the comments of the National Association of State Utility Consumer Advocates (NASUCA). Congress evidenced a clear intent

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[30] *See* HFT Comments at 12-14.

[31] *See, e.g.*, John Lawless Comments (recommending policies that would dramatically reduce problems currently faced by the 900 service industry, including (1) requiring the portability of 900 numbers; (2) requiring local exchange carriers to enforce the "first time forgiveness" program and blocking a consumer's access to 900 numbers if the consumer requests additional credits; (3) requiring establishment of a nationwide database to limit the overall charges for 900 services that a consumer may incur in a given month; and (4) establishing a website maintained by the Commission and the 900 service industry for the submission of complaints related to pay-per-call services).

to preserve the information services industry, and to provide a regulatory framework that would permit a vibrant industry to co-exist with important consumer protection regulations.[32]

The various suggestions of NASUCA, on the other hand, would essentially eliminate the industry. In addition, NASUCA makes suggestions that are directly contrary to the statute and could only be implemented through additional congressional action. While Pilgrim respects the role that NASUCA plays in the protection of consumers, it believes that some of NASUCA's recommendations are beyond the scope of this proceeding and the Commission's jurisdiction under the Communications Act of 1934 (Act).

For example, Pilgrim disagrees with NASUCA's suggestion that the Commission "should flatly prohibit use of any 800 numbers for pay-per-call."[33] The Commission cannot prohibit the use of 800 numbers, as suggested by NASUCA, nor should it. The Commission would not have any statutory authority to proscribe the use of 800 numbers in connection with the provision of pay-per-call services because Section 228(c)(7) of the Act[34] clearly permits the use of 800 numbers so long as the numbers are not used in a manner that results in certain outcomes that are specifically delineated in Section 228(c)(7). For example, 800 numbers may not be used in a manner resulting in "the calling party being assessed, by virtue of completing the call, a charge for the call."[35] Any action by the Commission intended to "flatly prohibit" the use

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[32] *See, e.g.,* 15 U.S.C. § 5701(8); 47 U.S.C. § 260; H.R. Conf. Rep. No. 104-458, at 1 (1996) ("to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans....").

[33] NASUCA Comments at 9.

[34] 47 U.S.C. § 228(c)(7).

[35] 47 U.S.C. § 228(c)(7)(A).

of 800 numbers would make a nullity of the mechanisms established by Congress in Section 228(c)(7).

Moreover, Pilgrim disagrees with NASUCA's suggestion that banishing the use of 800 numbers would be sound public policy. Barring information service providers from using 800 numbers, in ways that comply with the Section 228(c)(7) requirements, would deal a further blow to an industry whose future has been placed in grave jeopardy because of the industry's inability to use 900 numbers to deliver pay-per-call services. This inability is the direct result of all the regulatory and other constraints that have been discussed by Pilgrim and other commenting parties. It is far better for the Commission to enforce the Section 228(c)(7) requirements through reasonable regulations, instead of seeking to usurp the statute (as NASUCA advocates) by barring any use of 800 numbers by information service providers.

The Commission cannot require issuance of a personal identification number (PIN) only to the number to be billed, as suggested by NASUCA,[36] as it would essentially require hand delivery of the PIN. While Pilgrim joins NASUCA in decrying the fraudulent practices that could dilute protections intended to be provided through use of PINs,[37] Pilgrim believes it would be more practical, and fairer to the pay-per-call industry generally, for the FTC (and any other agencies with authority to do so) to take actions specifically aimed at preventing the fraudulent practices described by NASUCA. In contrast, the draconian approach suggested by NASUCA, on its face, would be immensely burdensome to pay-per-call providers. Moreover, NASUCA makes no attempt in its comments to explain what practical and cost effective means could be

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[36] NASUCA Comments at 5 ("FCC should require that [PINs] be . . . provided only to the person who will be billed for the service").

[37] *See id.* at 9.

used by pay-per-call providers to ensure that PIN numbers they issue are "specifically requested by and provided *only* to the person who has agreed to be billed for the service . . . ."[38]

NASUCA's proposal for "a ban on disconnection of local service for non-payment of any pay-per-call charges regardless of what number the call is accomplished through or whether a presubscription or credit card is involved"[39] should be rejected by the Commission as overbroad and unnecessary. To take one example, Pilgrim agrees with Blue Audio that "[s]ervices for which consumers do not pay additional charges . . . are not susceptible to the same types of fraud and deceit [as may occur with services, such as pay-per-call services, for which consumers pay additional charges], and thus do not require special safeguards."[40] Thus, if a consumer fails to pay long distance charges billed to the consumer in connection with the consumer's receipt of information services that have been made available to the consumer through arrangements between the information service provider and the long distance carrier, then there is no defensible reason to bar the disconnection of the consumer's local exchange service as a consequence of the consumer's refusal to pay the long distance bill.

Directory services cannot be restricted in the manner suggested by NASUCA[41] because such restrictions would be contrary to the statute. Pilgrim agrees with Metro One that Congress intended enhanced directory services to fall within the directory services exemption established in Section 228.[42]

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[38] *Id.* (emphasis in original).

[39] *Id.* at 5.

[40] Blue Audio Comments at 6.

[41] NASUCA Comments at 6 (the statutory exemption from pay-per-call consumer protections should be limited to "traditional" directory services).

[42] *See* Metro One Comments at 4-8.

While Pilgrim embraces the "overriding principle" stated by NASUCA that subscribers should receive sufficient information to confirm that their bills reflect only services they have ordered and received, at agreed prices,[43] Pilgrim opposes one of the means suggested by NASUCA to accomplish this goal. Specifically, NASUCA recommends that "[p]ay-per-calls billed pursuant to telephone company billings should show the name and the mailing address of the provider of the pay-per-call services."[44] The problem with this proposal is that NASUCA fails to give any explanation of how the proposal could be implemented. Billing for pay-per-call services pursuant to telephone company billings is effected through the use of an electronic message interface (EMI) system which consists of approximately 80 data fields. The current configuration of these EMI fields makes it impractical to attempt to incorporate the additional billing information suggested by NASUCA. Moreover, it would be costly and burdensome to attempt to overhaul the EMI structure to accommodate the input of this additional information. The Commission should reject NASUCA's proposal because of NASUCA's failure to explain how the proposal could be implemented.

Finally, Pilgrim opposes the evidentiary rules suggested by NASUCA.[45] Contrary to NASUCA's suggestion, Pilgrim believes that the complaining party – that is, the consumer challenging a bill – should bear the burden of proving that no authorization was given for the services received. Conventional evidentiary rules require the complaining party to bear the burden of proof, and NASUCA fails to advance any reasons why the Commission should reverse the conventional rule. The complaining party is better situated than the information service provider to present evidence proving the complaining party's assertion that it did not authorize

[43] *Id.* at 17.

[44] *Id.*

[45] *See id.* at 6.

the services at issue. Placing the burden on the information service provider would open the floodgates for various types of consumer fraud described by commenting parties.[46] For the same reasons, Pilgrim also opposes NASUCA's suggestion that there should be a rebuttable presumption that contested charges are unauthorized.[47] NASUCA seems to be advocating a position that information service providers are guilty until proven innocent, and there is no factual or legal justification for imposition of the rebuttable presumption.

## IV. EXTENSION OF TDDRA TO DATA SERVICES

The Commission also requested comment on whether further clarification is needed on the topic of whether data services fit within the pay-per-call definition.[48] TDDRA does not currently apply to data services, and it appears that no party has made a compelling argument to extend it.

Section 228(f)(3) of the Act (as enacted in TDDRA)[49] requests that the Commission prepare a report to the Congress about the advisability of extending TDDRA to data services. Neither Congress nor the Commission has extended TDDRA to data services. As a consequence, data services are not subject to any of the TDDRA regulations. Pilgrim believes that due to the language used in Section 228(f)(3), Congress would need to amend TDDRA in order to extend it to data services.

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[46] *See*, *e.g.*, John Lawless Comments (some consumers receive credit from a third party billing company by alleging that the call at issue was not authorized, and then receive an additional credit from the LEC for the same bill; "[t]hese consumers are actually making money by committing 900-service fraud").

[47] *See* NASUCA Comments at 6.

[48] 2004 NPRM at para. 35.

[49] 47 U.S.C. § 228(f)(3).

Pilgrim also believes that data services encompass all non-telecommunications services. Among these would be VoIP. Earlier this year the Commission found that a VoIP service offered by Pulver.com was neither telecommunications nor a telecommunications service, but was an unregulated information service subject to the Commission's jurisdiction.[50] As the Pulver.com type VoIP services are not telecommunications services, Pilgrim believes that they fall within "data services," which is consistent with the Commission's finding that they are unregulated information services.

As a result, Pilgrim believes that under the current regulations, any information service that is provided over VoIP or a packet switched network, even if accessed through the public switched telephone network (PSTN), is exempt from TDDRA. In the event that the Commission desires to extend the application of TDDRA to VoIP based services, even though accessed by consumers through the PSTN, it should develop a proposal and release it in a further NPRM for public comment, and may need further authorization from Congress to extend its jurisdiction in this manner. In any event, no record has been developed in this proceeding for such an extension of TDDRA.

## V. VERIFICATION AND PRESUBSCRIPTION

As the Commission and several commenting parties noted, the E-Sign Act[51] dispenses with the requirement of an actual written signature in many instances. The Commission should comply with the Act and permit the full range of electronic transaction confirmation practices

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[50] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004).

[51] Electronic Signatures in Global and National Commerce Act, 114 Stat. 464 (2000) (codified at 15 U.S.C. §§ 7001 *et seq.*).

that are both currently recognized and evolving under the E-Sign Act as evidence of written agreements for the purposes of TDDRA.

Furthermore, with respect to subscriptions taken over the telephone, Pilgrim agrees with PaymentOne Corporation (PaymentOne) that the Commission should adopt regulations that extend the application of its third party verification rules to telephone pre-subscription agreements.[52] In instances where an information service provider discloses all terms and conditions of service to a caller and has the conversation both verified by a third party and recorded, that should be deemed by the Commission to meet the written requirement. In the event that the Commission believes that some writing is required, the third party verification could be followed up with a confirmation letter setting forth all of the details.

Information providers should be permitted to begin offering service immediately upon third party verification so long as a confirmation letter is mailed, and so long as any charges are reversed if the calling party either revokes the agreement or the agreement is returned because of a bad address. Billing to a telephone number after an information provider enters into such an agreement should be deemed to be valid.

Once a valid pre-subscription agreement has been formed, information service providers are permitted by the statute to bill the charges to the local phone bill. Similar to the situation with 900 numbers, however, many or most carriers will not bill pre-subscribed or calling card information service calls, and grant credits in response to any complaint. The Commission needs to mandate reasonable billing and collection policies by LECs, CLECs and other local carriers in order to effectuate the intent of Congress, and prevent migration of information service providers to alternate platforms that are more difficult to regulate.

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[52] *See* PaymentOne Comments at 5.

## VI. ERRORS ON THE COMMISSION'S WEB SITE

The problems experienced by information service providers are compounded by incorrect statements made by the Commission itself on its web site. At the address http://www.fcc.gov/parents/telephone.html, a copy of which is attached, the Commission states that "[y]ou may not be charged for a 900 number call unless: 1. you have a written agreement with the information provider; or…" you are using a credit card, pre-paid card, debit card or calling card. This statement is an egregious misstatement not only of TDDRA as passed by Congress, but even the Commission's own rules. Pre-subscriptions and comparable arrangements are NOT required on 900 numbers – they are only required for information services provided via toll free numbers – which is specifically permitted by Congress. The Commission should correct this oversight immediately and remind consumers that they never have a right to fraudulently refuse to pay for service over the telephone – whether telecommunications or information service. The Commission should immediately post an erratum that corrects this oversight.

## VII. MODEM HIJACKING

A number of the parties spent considerable effort to discuss modem hijacking.[53] The basic principles behind modem hijacking appear to be the downloading of software to a person's computer, usually without the person's knowledge, which then causes the computer to make expensive calls without the computer owner's knowledge. It seems clear to Pilgrim that the process of modem hijacking, as Pilgrim understands it, is simple fraud that violates not only the TDDRA but also FTC statutes and regulations. The Commission should either prohibit the practice outright, or at least impose the same types of clear notices and rights to terminate calls

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[53] *See*, *e.g.*, Verizon Comments.

that apply under TDDRA generally, to the extent that the Commission has jurisdiction in this area.

Pilgrim wants to make clear, however, that modem hijacking is not a common practice in the pay-per-call or information services industry. It seems clear that modem hijacking does not involve the provision of information services, or perhaps the provision of communications at all, and that the only purpose of the practice appears to be the generation of charges billed to consumers.[54] While the Commission should take such action as is necessary and under its jurisdiction to prohibit this practice, the Commission should not take action under the general TDDRA rules in a manner that would penalize all information service providers for the actions of modem hijackers. For example, Verizon suggests that the Commission should authorize U.S. international carriers to withhold payment of international settlement rates "to foreign carriers that partner with . . . information service providers [operating the scams described by Verizon]."[55] Verizon fails to explain, however, how its proposal would separate the "good guys" from the "bad guys" in order to avoid the risk that legitimate information service providers would be penalized by payment withholdings.

It also appears from the comments of the parties to this proceeding that the FTC has been successfully enforcing its statute against modem hijackers. It would appear that the

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[54] Verizon explains the practice as follows:

> Calls are . . . dialed automatically and at random times, without the customer's knowledge, and are carried by the customer's presubscribed long distance carrier to international destinations such as Tuvalu, Cook Islands, and Sao Tome. The terminating foreign carrier in these locations shares a portion of the international settlement rate it charges to terminate these calls with the scam operator.

Verizon Comments at 1-2.

[55] *Id.* at 2.

Commission's concern at this point amounts to seeking to close the barn door after the horses have left the barn, or derives from the Commission's belief that it should have taken a more aggressive role along with the FTC. The Commission might be able to impose notice and other requirements on parties engaging in modem hijacking, but it seems the real jurisdiction to prohibit or regulate this practice lies with the FTC.

## VIII. CONCLUSION

Pilgrim respectfully requests that the Commission undertake a serious consideration of Pilgrim's comments and reply comments filed in this proceeding, and adopt the proposals that Pilgrim sets forth herein.

Respectfully submitted,

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# Using the Telephone Responsibly: 900 Number Blocking

The FCC regulates United States telephone companies that are involved in transmitting and billing interstate pay-per-call ("900 numbers") and other information services. **Don't confuse 900 numbers with 800 or 888 numbers.** You pay for a 900 number call. **You do not have to pay** for most 800, 888, or other toll-free number calls.

You may not be charged for a 900 number call unless:

1. you have a written agreement with the information provider; or
2. if you are using a credit card, prepaid card, debit card or calling card, you must be given introductory information that:
   a. clearly states that there is a charge for the call;
   b. clearly states the service's total cost per minute and other fees for the service or for any service to which the caller may be transferred;
   c. explains that the charges must be billed on either a credit, prepaid, debit, charge, or calling card;
   d. asks the caller for the card number;
   e. clearly states that the charges for the call begin at the end of the introductory message; and
   f. clearly states that the caller can hang up at or before the end of the introductory message without incurring any charge whatsoever.

To help protect yourself:

- **Talk with your children.** Make sure they understand they shouldn't call 900 numbers without your permission. You can have the phone company block 900 number calls from your phone. The FCC requires local phone companies to make blocking available — where technically feasible — for a "reasonable" fee. However, any subscriber with a new number can request free blocking within 60 days after service begins.

- **Deal only with reputable companies.** Some companies or organizations sponsor 900 number services for opinion surveys, information, entertainment or other services. Before you call a 900 number, be sure you understand the cost of the call and the nature of the information or service you'll receive.

- **Think twice before calling a 900 number for a "free" gift.** Television ads, postcards and telemarketers may urge you to call a 900 number to get a "free" prize. But you pay for the so-called free gift by making the 900 number call. The provider of the service usually makes money on a per-minute basis, so there's an incentive to keep you on the line.

**Read our fact sheet on 900 number pay-per-call and other information services...**

*last reviewed/updated on 5/22/03*



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